

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

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Docket No. 145,819

## ORDER

The Kansas Workers Compensation Fund and claimant request the Appeals Board review the Award of Administrative Law Judge Alvin E. Witwer entered in this proceeding on June 2, 1994.

## APPEARANCES

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. The respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, J. Paul Maurin III of Kansas City, Kansas. There were no other appearances.

# RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

## STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

### ISSUES

The Administrative Law Judge found claimant entitled to permanent partial disability benefits based upon his functional impairment rating of ten percent (10%). The Administrative Law Judge reasoned that claimant had obtained his bachelor's and master's degrees in social work and, therefore, possessed the ability to perform work in the open labor market and earn comparable wages. The claimant disagrees with that finding and requests review by the Appeals Board. The Workers Compensation Fund disagreed with the finding of the Administrative Law Judge that it is responsible for one-hundred percent (100%) of the award and requests the Appeals Board to review that issue.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

For the reasons expressed below the Appeals Board finds claimant is entitled to permanent partial disability benefits based upon a fifty-one percent (51%) work disability through May 31, 1993, the approximate date he was scheduled to receive his master's degree in social work from the University of Kansas. After that date, claimant is entitled to receive permanent partial disability benefits based upon his functional impairment rating of ten percent (10%). The Workers Compensation Fund is responsible for all the costs and benefits associated with this award.

(1) Claimant began working for the respondent in 1970 as a grocery sacker and carry-out. In February 1990, claimant became a checker. The constant bending and twisting required of this job caused increasing pain in claimant's low back. Claimant received conservative treatment and returned to work for respondent in the bakery department. Unable to perform this job, claimant left respondent's employment in June 1990.

For purposes of this proceeding, the parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on February 5, 1990, and earned \$550.51 per week, excluding the value of a 401(K) retirement plan.

Prior to his injury, claimant had arranged to attend the University of Kansas. In May 1990, claimant obtained a bachelor's degree in social work. In July 1990, claimant obtained employment as a case manager earning \$16,500 per year. When claimant quit that job to return to school to work on his master's degree in May 1992, he was earning \$18,400 per year. While on this job, claimant testified he received fringe benefits with an estimated annual value of \$1,000.

Claimant testified at Regular Hearing in this proceeding in March 1993. At that time, claimant was scheduled to receive his master's degree in social work from the University of Kansas two months later in May.

Claimant presented vocational rehabilitation expert, Michael J. Dreiling. Because claimant has obtained his master's degree in social work, Mr. Dreiling believes claimant has the ability to earn between \$9-15 per hour, plus a fringe benefit package worth fifteen to nineteen percent (15-19%) of the hourly rate. According to Mr. Dreiling, claimant will not reach the upper portion of the salary range until he gains more experience.

Based upon the information provided by Mr. Dreiling, the sole vocational rehabilitation or labor market expert testifying in this proceeding, the Appeals Board finds claimant has the ability to earn a comparable wage as a direct result of his obtaining the master's degree. The low end of claimant's prospective annual salary range is \$21,528 which is computed using the \$9 per hour wage rate and fifteen percent (15%) fringe benefit rate. The high end of the range is \$37,128 which is computed by using the \$15 per hour wage rate and the nineteen percent (19%) fringe benefit rate. Therefore, the mean of this salary and fringe benefit range is \$29,328, an amount greater than the annual wage of \$28,627 which claimant was earning at the time of his accidental injury.

Permanent partial disability benefits for nonscheduled injuries for this date of accident are governed by K.S.A. 1989 Supp. 44-510e, which provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board agrees with the Administrative Law Judge that claimant possesses the ability to earn a comparable wage for the period after he obtained his master's degree. Therefore, the presumption of no work disability found in the above-cited statute applies. However, for the period prior to receipt of the master's degree, claimant did not have the ability to earn a comparable wage and, in fact, had an actual wage loss of thirty-two to thirty-nine percent (32-39%) while working as a case manager. Averaging this wage loss with Mr. Dreiling's opinion of a sixty-six percent (66%) loss of access of labor market yields a work disability of fifty-one percent (51%). Although the Appeals Board is cognizant that it is not required to average loss of ability to earn a comparable wage with loss of ability to perform work in the open labor market to obtain the percentage of work disability, in this case there appears no compelling reason to give either factor greater weight and, accordingly, they are weighed equally.

Because we do not know the precise day claimant received his master's degree in 1993, the Appeals Board designates the last day of the month, May 31, 1993, as the last day claimant has proven work disability. Therefore, June 1, 1993, is the first date claimant's benefits are to be computed based upon functional impairment.

The Appeals Board affirms the finding of the Administrative Law Judge that claimant's functional impairment is ten percent (10%). The testimony of two physicians was presented. James S. Zarr, M.D., testified claimant's functional impairment rating is five percent (5%) as a result of myofascial low back pain, whereas Edward J. Prostic, M.D., testified claimant has a functional impairment rating of ten to twenty percent (10-20%) as a result of chronic lumbar strain that causes mechanical low back pain. Because Dr. Prostic had the benefit of the results of an MRI and Dr. Zarr did not, nor did Dr. Zarr utilize any type of impairment rating manual, the Appeals Board finds the opinion of Dr. Prostic deserves more weight in this instance.

Based upon the above, claimant is entitled to permanent partial disability benefits based upon a fifty-one percent (51%) work disability through May 31, 1993, and after that date benefits are based upon the partial functional impairment rating of ten percent (10%).

(2) The Workers Compensation Fund is responsible for all the costs and benefits associated with this Award.

Under the provisions of K.S.A. 1989 Supp. 44-567, an employer, who operates under the provisions of the Workers Compensation Act and who knowingly employs or retains an employee that has an impairment that would otherwise constitute a handicap in obtaining or retaining employment, shall be relieved of liability for compensation awarded or be entitled to an apportionment of the cost thereof when the employee suffers a later injury or disability related to the pre-existing impairment. The respondent and insurance carrier have proven that respondent retained claimant in its employment despite its knowledge that claimant possessed a physical impairment to his back that constituted a handicap in obtaining or retaining employment. Claimant's back problems began in the mid to late 1970s. Claimant saw Dr. Wertzberger for treatment during the 1980s and was given back exercises to perform on a regular basis. Although the claimant missed only several days of work, the respondent filed a Form 88, Notice of Handicap, Disability or Physical Impairment with the Director of the Division of Workers Compensation both in 1981 and in 1984. Despite knowledge of his ongoing difficulties with his back, respondent retained claimant.

Whenever an employee is injured or disabled as a result of an injury and the injury or disability most likely would not have occurred but for the pre-existing physical impairment, all compensation and benefits payable because of the injury shall be paid by the Workers Compensation Fund. See K.S.A. 44-567(a)(1). Both physicians who testified in this proceeding believe claimant's current injury is the result of the aggravation of a pre-existing disease and condition, and both believe the aggravation would not have occurred but for the pre-existing disease process. This evidence is uncontroverted.

Based upon the above, the finding of the Administrative Law Judge that the Workers Compensation Fund is solely responsible for this Award is affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated June 2, 1994, should be, and hereby is, modified as follows.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF** the claimant, Thomas B. Chaffin, and against the respondent, Dillon Companies, Inc., and its insurance carrier, Continental National American Group, and the Kansas Workers Compensation Fund, for an accidental injury which occurred February 5, 1990, and based upon an average weekly wage of \$550.51, for 21 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$5,691.00, followed by 1 week of temporary partial disability at the rate of \$151.14 per week, or \$151.14, followed by 151.14 weeks of permanent partial disability benefits at the rate of \$187.19 per week or \$28,291.90, for a 51% work disability, followed by 241.86 weeks of permanent partial disability benefits at \$36.70 per week or \$8,876.26 for a 10% permanent partial impairment of function to the body, making a total award of \$43,010.30

As of March 3, 1995, there is due and owing claimant 21 weeks of temporary total disability compensation at the rate of \$271.00 per week or \$5,691.00, one week of temporary partial disability at the rate of \$151.14, 151.14 weeks of work disability at the rate of \$187.19 or \$28,291.90, 91.57 weeks of permanent partial disability benefits at the rate of \$36.70 or \$3,360.62 for a total of \$37,494.66 ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$5,515.64 is to be paid for 150.29 weeks at the rate of \$36.70 per week, until fully paid or further order of the Director.

Claimant is entitled to future medical treatment and the payment to him of the sum of \$350 as an unauthorized medical allowance upon application to the Director for such benefits.

The Kansas Workers Compensation Fund is responsible for the payment of compensation awarded herein, and responsible to reimburse the respondent-insurance carrier for the payment of benefits previously made.

The claimant's contract of employment with his attorneys has not been made a part of the record. However, the claimant's attorneys are granted a lien against the proceeds of this award of not more than 25% pursuant to K.S.A. 44-536.

All necessary fees to defray the expense of administration of the Workers Compensation Act are assessed against the Kansas Workers Compensation Fund as follows:

Metropolitan Court Reporters, Inc.	\$261.80
Hostetler & Associates, Inc.	\$872.10

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Kansas City, KS  
Rex W. Henoch, Lenexa, KS  
J. Paul Maurin, Kansas City, KS  
Alvin E. Witwer, Administrative Law Judge  
George Gomez, Director